Supreme Court, U.S.
FILED
JUL 19 1996
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(8) (8)

Nos. 95-1460 and 95-1425

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, APPELLANT

v.

DAVIDA JOHNSON, ET AL.

LUCIOUS ABRAMS, ET AL., APPELLANTS

v.

DAVIDA JOHNSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS APPELLANT

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QUESTIONS PRESENTED

1. Whether the district court's congressional districting plan for the State of Georgia contains a greater deviation from the constitutional one-person, one-vote requirement than is necessary or justifiable.

2. Whether the district court's congressional districting plan for the State of Georgia deprives African-Americans of an equal opportunity to participate in the electoral process and elect candidates of their choice, and thereby violates Section 2 of the Voting Rights Act.

3. Whether the district court's congressional districting plan for the State of Georgia departs from state districting policies to a greater extent than necessary to cure the constitutional violations in the State's plan, in contravention of this Court's decision in *Upham* v. *Seamon*, 456 U.S. 37 (1982).

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the plaintiffs below were Pam Burke, Henry Zittrouer, George L. DeLoach, George Seaton, James Rhodes, Gary Heard, Daniel Morrel, and Donald Shirah. The defendants below were Zell Miller, Governor of Georgia, Pierre Howard, Lieutenant Governor of Georgia, Thomas Murphy, Speaker of the House of Representatives of Georgia, and Max Cleland, Secretary of State of Georgia. Max Cleland has been succeeded as Secretary of State by Lewis Massey. Intervenor-defendants were Lucious Abrams, Jr., Rev. G.L. Avery, William Gary Chambers, Sr., and Karen Watson.

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BRIEF FOR THE UNITED STATES AS APPELLANT

OPINIONS BELOW

The remedial order and opinion of the three-judge district court (J.S. App. 1a-29a[1]) is reported at 922 F. Supp. 1556. The three-judge court's earlier opinion with regard to Georgia's Second Congressional District (J.S. App. 30a-38a) is reported at 922 F. Supp. 1552. This Court's prior opinion in this case is re-

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[1] "J.S. App." refers to the appendix to the United States' Jurisdictional Statement in No. 95-1460.

ported at 115 S. Ct. 2475. The three-judge court's original liability opinion is reported at 864 F. Supp. 1354.

JURISDICTION

The judgment of the three-judge district court was entered on December 13, 1995. The United States filed a notice of appeal on January 12, 1996 (J.S. App. 47a-48a). This Court noted probable jurisdiction on May 20, 1996. 116 S. Ct. 1823. The jurisdiction of this Court rests on 28 U.S.C. 1253.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The following constitutional, statutory, and regulatory provisions involved are set forth in the appendix to this brief: Art. I, § 2, of the United States Constitution; Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973; Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c; and 28 C.F.R. 51.54.

STATEMENT

In *Miller* v. *Johnson*, 115 S. Ct. 2475, 2490 (1995), this Court held that the Eleventh District in Georgia's 1992 congressional redistricting plan violated the Equal Protection Clause because "[r]ace was * * * the predominant, overriding factor explaining the [Georgia] General Assembly's decision to attach to the Eleventh District various appendages containing dense majority-black populations," and because that use of race was not "narrowly tailored to achieve a compelling interest." On remand, the three-judge district court held that the Second District in Georgia's plan—also a majority-minority district—was similarly unconstitutional. After the legislature was unable to enact a new plan, the district court

devised its own remedial plan. This appeal seeks reversal of the district court's judgment on the ground that the plan it ordered into effect violates constitutional one-person, one-vote requirements, Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, and the requirement that a court imposing a redistricting plan depart as little as possible from the State's redistricting policies, see *Upham* v. *Seamon*, 456 U.S. 37 (1982).

1. The 1990 census entitled the State of Georgia to an additional—eleventh—congressional district. Prior to that census, African-Americans, although 27% of Georgia's population, constituted a majority of the voting age population (VAP) in only one of Georgia's ten congressional districts—the Fifth District, located in the Atlanta area. See *Busbee* v. *Smith*, 549 F. Supp. 494 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983). In 1991 and early 1992, the Georgia legislature enacted two successive redistricting plans. Each of them contained two majority African-American districts: the Fifth District, in the Atlanta area, and the Eleventh District, extending eastward from the DeKalb County suburbs of Atlanta. The Department of Justice interposed objections to both plans under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c.

In 1992, the state legislature enacted a plan containing three congressional districts in which African-Americans constituted a VAP majority. See *Miller* v. *Johnson*, 115 S. Ct. 2475, 2482-2484 (1995). That plan received preclearance, but the Eleventh District was found unconstitutional by a three-judge district court. *Johnson* v. *Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994).

This Court affirmed. The Court held that the district court had correctly subjected the Eleventh District to strict scrutiny because race had been "the predominant, overriding factor" in the drawing of the Eleventh District. 115 S. Ct. at 2490. The Court found that the State's plan "subordinated traditional race-neutral districting principles * * * to racial considerations." *Id.* at 2488. The Court noted that the plan's extension of the Eleventh District to Savannah was occasioned entirely by the desire to place African-American population in the City of Macon (Bibb County) in the Second District, *id.* at 2489, and that many counties and precincts were split for the sole purpose of increasing the Eleventh District's black population, *ibid.*

Applying strict scrutiny, the Court concluded that the State's use of race in drawing the plan was not justified by the objective of complying with Section 5 of the Voting Rights Act. The Court held that there was "no reasonable basis to believe that Georgia's earlier enacted [two majority-minority district] plans violated § 5," because they were not retrogressive and because "[t]he State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference" of discriminatory purpose under Section 5. 115 S. Ct. at 2492.

2. On remand, the district court permitted the plaintiffs to add parties and amend their complaint to challenge the Second Congressional District (the other new majority-minority district that had been created by the State in 1992). J.S. App. 1a-2a. The district court refused, however, to allow any Georgia voters to intervene in defense of the Second District. On October 30, 1995, the district court held a hearing

on the constitutionality of the Second District. On December 1, 1995, the district court issued an order holding the Second District unconstitutional, for essentially the same reasons that this Court had held the Eleventh District unconstitutional. J.S. App. 30a-38a.

3. After this Court's remand order, the district court offered the legislature an opportunity to formulate a new districting plan, but the legislature was unable to do so. Each chamber of the state legislature passed a different plan and, on September 13, 1995, the legislature notified the court that it was unable to redraw the map. J.S. App. 2a.

4. In October, 1995, the district court issued two orders. The first (R. 325: Order of October 18, 1995) called upon the parties to submit remedial plans that corrected the faults of the unconstitutional plan while making the fewest changes in it. The second order asked the parties to file remedial plans "that comport[] with Georgia's historical districting principles, Constitutional requirements, and the Voting Rights Act." R. 329: Order of October 20, 1995. The second order requested the parties not to base their proposals on the plan that had been ruled unconstitutional in part by this Court, but rather upon the first plan Georgia had enacted in 1991—a plan containing two majority-minority districts.

The plans offered to the district court during the remand proceedings fell into two general categories. In one category were four plans submitted by the Abrams Intervenors, one submitted by Congressmen Lewis and Gingrich, and one passed by the State House. See R. 296; J.A. 190-199. Those plans each

contained at least two districts[2] with African-American VAP majorities: the Fifth, in the Atlanta area, and the Eleventh. In each plan, the Eleventh District had about a 50%-53% black VAP. In all but one, the Eleventh District was located in the same east-central part of Georgia as the Eleventh District in the State's three 1991 and 1992 plans, but with counties reunited and the extension to Savannah removed. Of this group of plans, the Abrams Plan A (J.A. 195) had the lowest overall population deviation[3] (0.29%[4]), while the plan passed by the state House (J.A. 191) had the highest overall deviation (1.92%).

In the second category were the plaintiffs' proposed plans and the plan that had been passed by the state Senate. R. 342; J.A. 200-201; R. 295. In each of them, only the Fifth District, which encompassed the City of Atlanta and some surrounding areas, had an African-American VAP majority. None of these plans contained another congressional district in which the African-American VAP was greater than

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[2] One of the plans, which was known as the Abrams Plan A, had three African-American majority VAP districts. See J.A. 195.

[3] We use the term "overall population deviation" to mean the difference, expressed as a percentage of the population of an ideally apportioned district (in this case, one with exactly one-eleventh of the State's population), between the populations of the district with the largest population and the district with the smallest population.

[4] When we reprinted the various maps and statistics for purposes of compiling the Joint Appendix, it became evident that a small part of District 10 was not contiguous with the rest of the district in Abrams Plan A, apparently as the result of a computer error. The record before the district court showed the overall deviation for the plan as thus constructed as 0.29%.

40%. The range of overall population deviations for those plans was between 0.74% in plaintiffs' remedy 1B (see R. 342 and attachment), and 1.84%, for the State Senate plan (see R. 295, at 3). After a hearing on October 31, the district court ordered plaintiffs to resubmit one of their plans with reduced overall population deviation. R. 363. The resulting plans—Remedy 4X and 4XR, see J.A. 202-203—had overall population deviations of 0.52%. The court called upon the parties to submit comments by November 22. R. 363.

On November 22, the United States submitted a brief (R. 369), accompanied by an "Illustrative Plan," arguing that the plaintiffs' proposed Remedies 4X and 4XR did not meet the requisite standards of population equality, made more changes than necessary to cure the constitutional violation, and violated the Voting Rights Act by including only one majority-minority district. The Illustrative Plan was intended to illustrate that a plan could be drawn with two compact majority-minority districts and minimal population deviations that adheres to Georgia's traditional policy choices. It splits only two counties outside the metropolitan Atlanta area. Its overall population deviation of 0.19% was the lowest overall population deviation of any plan before the district court. The plan includes two compact majority African-American districts—the Fifth and the Eleventh. A map of the Illustrative Plan and demographic data for the district appear at J.S. App. 44a-45a.[5]

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[5] The maps of the district court's plan, J.S. App. 42a, the Illustrative Plan, *id.* at 44a, and the first plan the State adopted after the 1990 census, *id.* at 46a, were reproduced on computers

5. On December 13, 1995, the three-judge district court adopted the plan from which this appeal is taken. The plan, a map of which appears at J.S. App. 41a, closely resembles the plan (Remedy 4X, reproduced at J.A. 202) that the plaintiffs submitted in response to the court's order following the October 31 hearing. It has an overall population deviation of 0.35%. It includes only one majority-minority district (the Fifth), which contains a 57% African-American VAP. J.S. App. 6a, 25a. See also *id.* at 43a (demographic data for court's plan). The court ordered the State to adhere to that plan "until the legislature convenes to change it * * * following the millennium census, or before." *Id.* at 28a-29a.

a. The district court recognized that, "[i]n fashioning a remedy in redistricting cases, courts are generally limited to correcting only those unconstitutional aspects of a state's plan," because such a "minimum change plan acts as a surrogate for the

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at the Department of Justice so that the colors and legends on the maps would be uniform. Similarly, the following maps included in the Joint Appendix have been reproduced on Department of Justice computers, and for the same purpose: Congressional Redistricting Plan MSLSS, August 25, 1995 (Abrams Exhibit 37) (House Passed Plan) (J.A. 190); Congressional Redistricting Plan Amicus-R (Lewis/Gingrich) (Exhibit Amicus 1) (J.A. 192); Congressional Redistricting Plan ACLU1A (Abrams Exhibit 36) (Selwyn Carter's "least change" plan) (J.A. 198); Congressional Redistricting Plan SRC/ACLU Plan A (July 31, 1995) (Abrams A) (R. 296 and R. 319) (J.A. 194); Congressional Redistricting Plan SRC/ACLU Plan C (Abrams C) (R. 296) (J.A. 196); Congressional Redistricting Plan Plaintiffs' Remedy 4 (Plaintiffs' Exhibit 56) (J.A. 200); Congressional Redistricting Plan Plaintiffs' Remedy 4X (R. 367, Exhibit B) (submitted in response to District Court's Order of November 9, 1995) (J.A. 202).

intent of the state's legislative body." J.S. App. 2a-3a (citing *Upham* v. *Seamon*, 456 U.S. 37 (1982)). The court held, however, that "Georgia's current plan was tainted by unconstitutional [Department of Justice] interference," J.S. App. 4a, and that the court therefore "c[ould] not use Georgia's current plan as a surrogate for the legislature's reapportionment policies and goals." *Id.* at 5a. The court also stated that "any remedy even minimally disruptive to the current plan would necessarily have resulted in drastic changes" because the two districts that had been declared unconstitutional were "on opposite sides of the state," and "it is a virtual impossibility to change less than we have." *Id.* at 6a.

With respect to the goal of population equality, the court noted that "federal courts are held to stricter standards than legislatures," and that the court therefore was "particularly constrained to create a remedy with the lowest population deviation practicable." J.S. App. 7a. The court stated that only the Illustrative Plan submitted by the Department of Justice had a lower overall deviation than the plan the court adopted, *id.* at 8a-9a & n.4,[6] but the court rejected that plan because it "split numerous counties outside of the metropolitan Atlanta area, apparently for racial reasons." *Id.* at 8a n.4. The Illustrative Plan in fact split only two counties outside the Atlanta area. See *id.* at 44a (map).

The court conceded that "there is some deviation resulting from our adherence to Georgia's traditional

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[6] This statement was incorrect; in addition to the Illustrative Plan, the record indicated that two other plans submitted by the Abrams Intervenors had lower overall deviations (0.29% and 0.34%) than the court's plan. See J.A. 195; R. 296 and 319.

districting principles and unique factors." J.S. App. 8a. The court identified those factors as the State's "strong historical preference for not splitting counties outside of the metropolitan Atlanta area," *ibid.*; see also *id.* at 15a-16a, and the "maintenance of district cores and communities of interest," *id.* at 10a; see also *id.* at 17a-18a. The court acknowledged that "Georgia has historically sought to draw district lines so incumbents remain in their districts in a new plan and to avoid placing two incumbents in the same district." *Id.* at 18a; see also *id.* at 14a n.10. The court stated, however, that, although it "considered this factor," it "subordinated it to the other considerations" because "it is inherently more political than factors such as communities of interest and compactness." *Id.* at 18a. Accordingly, the court's plan placed the residences of two incumbents—the African-American Members of Congress from the former Eleventh and Second Districts—in districts containing the residences of other incumbents, and it moved the residence of the incumbent from the former Eighth District into the Second District. *Id.* at 21a.

b. The court also discussed the application of the Voting Rights Act to its plan, noting that "[d]uring the remedy phase of the hearing, a significant portion of the argument centered on whether the Court's remedy would be required by Section 2 to contain two majority-minority districts." J.S. App. 19a. In order to find that a districting plan violates Section 2, a court must conclude that the minority population is sufficiently compact and numerous to form a district, that the minority group is politically cohesive, and that whites voting as a bloc usually defeat the candidate of choice of minority voters. See *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986). (This Court

referred to the latter two factors collectively as "legally significant racially polarized voting." See *id.* at 56.)

With respect to compactness and numerosity, the court noted that "[i]f Georgia had a concentrated minority population large enough to create a second majority-minority district without subverting traditional districting principles, the Court would have included one since Georgia's legislature probably would have done so." J.S. App. 21a n.16. Regarding polarization, the court repeated the assertion it had made in its earlier decision in this case that, "while some degree of vote polarization exists, it is 'not in alarming quantities.'" *Id.* at 23a (quoting 864 F. Supp. at 1390). Nonetheless, the court held that Section 2 "does require maintenance of the Fifth District as a majority-minority district," J.S. App. 24a-25a, and that "maintaining the percentage of black registered voters [in the Fifth District] as close to fifty-five percent as possible was necessary, in our view, to avoid dilution of the Fifth District minorities' rights." *Id.* at 25a-26a. The court concluded, however, that Section 2 does not require a second majority-minority district in Georgia "due primarily to the geographic dispersion of [Georgia's] minority population and lack of any significant vote polarization." *Id.* at 20a.

c. Judge Edmondson noted his dissent, but did not file an opinion. J.S. App. 29a.

SUMMARY OF ARGUMENT

The United States seeks reversal of the district court's order imposing upon the State of Georgia a congressional redistricting plan that reduces from three to one the number of majority-minority districts. The district court's plan, which purports to

remedy the constitutional defects found in the 1992 plan, violates established principles respecting court-ordered redistricting and denies African-American citizens equal opportunity to participate in the political process and elect representatives of their choice to Congress.

A. The court's redistricting plan violates the one-person, one-vote requirement of Article I, Section 2, of the Constitution. Alternative plans demonstrate that it is possible to achieve a significantly smaller overall deviation from ideal district population size than is present in the court's plan.

B. The district court's plan violates Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. Section 2, properly applied, requires creation of a majority-minority district in east-central Georgia. Alternative plans show that the black population of that area is sufficiently compact to satisfy the first prong of a Section 2 case under *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). The district court's own findings and the record below amply demonstrate that the African-American voters in this area vote cohesively, and their candidates of choice are generally defeated by white voters voting as a bloc. Georgia's history of discrimination and the totality of circumstances, moreover, clearly show that failure to draw a majority-minority congressional district in this area violates Section 2.

C. The district court's congressional districting plan violates the rule set forth in *Upham* v. *Seamon*, 456 U.S. 37 (1982), by making more changes in the existing plan than necessary to correct that plan's constitutional defects. The court's plan disregards the State's policy of having at least two majority-minority districts—a policy embodied in all three

districting plans enacted by the Georgia legislature since the 1990 census. The Illustrative Plan, on the other hand, while splitting only two counties outside of the Atlanta area, contains two majority-minority districts and closely resembles the first plan passed by the legislature in 1991, which provides a useful indication of state policies prior to the Section 5 preclearance process. It also maintains the cores of the districts as they existed in 1992 without incorporating the unconstitutional features of that plan.

D. The Abrams appellants have argued in addition that the district court's plan is unnecessarily retrogressive, in violation of the substantive standards of Section 5. We agree that it is. We note, however, that in the present posture of this case, the question whether the district court's plan is retrogressive turns on the same factors as the question whether it violates Section 2 and the principles of *Upham* v. *Seamon*.

ARGUMENT

A. THE DISTRICT COURT'S PLAN DEVIATES UNJUSTIFIABLY FROM THE PRINCIPLE OF POPULATION EQUALITY

The district court clearly erred in adopting a plan that deviates from the principle of population equality more than is necessary or justifiable. Article I of the Constitution requires that congressional districts achieve population equality "as nearly as is practicable." *Wesberry* v. *Sanders*, 376 U.S. 1, 7-8 (1964). This requirement is close to an absolute standard. *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 527-528 (1969). When a state legislature draws congressional districts, "the command of Art. I, § 2, as regards the National Legislature outweighs the local inter-

ests that a State may deem relevant in apportioning districts for [state legislative] representatives." *Karcher* v. *Daggett*, 462 U.S. 725, 733 (1983).

Where a state legislature draws congressional districts, a minimal deviation from absolute population equality may be justified by consistently applied state legislative policies, such as "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." *Karcher*, 462 U.S. at 740. But, as the district court correctly noted, J.S. App. 7a, the standard for court-ordered districting plans is a stricter one. *Connor* v. *Finch*, 431 U.S. 407, 413-414 (1977); *Chapman* v. *Meier*, 420 U.S. 1, 26-27 (1975). Because redistricting is "'primarily a matter for legislative consideration and determination,' * * * a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality." *Connor*, 431 U.S. at 414-415 (quoting *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964)). Courts, on the other hand, have no mandate "to compromise sometimes conflicting state apportionment policies in the people's name." *Connor*, 431 U.S. at 415.

1. The district court's plan contravenes the principle of population equality. The largest population deviation in the court's plan is 0.35%, between the Third District (which deviates by +0.12% from absolute population equality) and the Second District (which deviates by -0.23%). J.S. App. 43a. In contrast, the largest population deviation in the Hlustrative Plan, submitted by the Department of Justice, is 0.19%—between the Tenth District (which deviates by +0.09%) and the Eleventh District (which deviates

by -0.10%). *Id.* at 45a. That difference in deviations is sufficient to have required the district court to adopt the Illustrative Plan (or some other plan with an equal or smaller deviation), unless there is a compelling justification for its failure to do so.

2. In a footnote, the court justified its decision to adopt a plan with a greater population deviation than that in the Illustrative Plan on the ground that the Illustrative Plan "split numerous counties outside of the metropolitan Atlanta area, apparently for racial reasons." J.S. App. 8a n.4.[7] That justification is clearly insufficient. The Illustrative Plan splits two counties outside the Atlanta area; both divisions are explicable on non-racial grounds and are consistent with traditional districting principles.

The Illustrative Plan splits Muscogee County in southwestern Georgia, in which part of Fort Benning is located, between the Second and Third Districts. In the court's plan, those districts are the two with the highest deviations (-0.23% and +0.12%), adding up to a total deviation of 0.35%. By splitting Muscogee County, the Illustrative Plan dramatically lowered

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[7] In that footnote, the court also stated that "[w]hether the DOJ should be involved in this, the map-generation phase of the redistricting process is questionable," apparently because "[n]ormally, Georgia would originate a plan for DOJ preclearance under Section 5 [of the Voting Rights Act]." J.S. App. 8a n.4. There is no reason why the Department of Justice should not be permitted to introduce plans in a redistricting case in order to provide bases for analysis under Section 2 and constitutional one-person, one-vote requirements. Submission of such a plan is ordinarily essential in order to make out the preconditions for a Section 2 case under *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). Despite its doubts, the district court accepted the submission of the Illustrative Plan and considered it on its merits.

the deviation from population equality of the two districts; the deviation of the two districts in the Illustrative Plan is, respectively, 0.01% and 0.02%. In splitting Muscogee County, the Illustrative Plan also keeps all of Fort Benning—which is located in Muscogee and Chattahoochee Counties—in the Second District. The State's first post-1990 plan also kept Fort Benning in one district by splitting a county (in that plan, Chattahoochee County). See J.S. App. 46a (map). The court's plan keeps Muscogee and Chattahoochee Counties intact, but it splits Fort Benning between the Second and Third Districts. The Illustrative Plan is thus more consistent with the State's own preferences than the court's plan, results in a much smaller population deviation, and is explicable on nonracial grounds (the desire to keep Fort Benning in a single district).

The Illustrative Plan also splits Bibb County, in the center of the State, among the Third, Eighth, and Eleventh Districts. Under the court's plan, the deviation in those districts is +0.12%, -0.17%, and +0.08%, respectively. J.S. App. 43a. Under the Illustrative Plan, the deviation in those three districts is +0.03%, +0.05%, and -0.10%. *Id.* at 45a. The Illustrative Plan thus reduces the deviation substantially in two of the districts and increases it only slightly in the third.[8] Each of Georgia's first two post-1990 plans

[8] The population deviation of 0.19% between the Tenth and Eleventh Districts in the Illustrative Plan could be decreased with some minor changes in the Atlanta area or in Bibb County. In the course of the proceedings below, the United States endorsed plans that contained two majority-minority districts having overall population deviations larger than that in the court's plan. For example, we told the court in October, 1995, that two such plans appeared to "comply with the United States Constitution and the Voting Rights Act," United States' Brief on Remedy, R. 348, at 1-2, and we again endorsed those plans for their balancing of race and traditional districting criteria at the October 30-31 hearing. Tr. 414, 421-422. There was testimony, however, that, with minor changes, the population deviations in those plans could be made much smaller. J.A. 164 (testimony of Selwyn Carter).

also split Bibb County, placing most of the City of Macon in a majority-minority district. See *id.* at 46a (map of first enacted post-1990 plan)). The Illustrative Plan thus follows state policies in this respect as well.[9]

Keeping county boundaries intact cannot be an absolute goal in the redistricting process. See, *e.g.*, *Kirkpatrick*, 394 U.S. at 533-534 ("[W]e do not find legally acceptable the argument that variances are justified if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries."); *Wells* v. *Rockefeller*, 394 U.S. 542, 546 (1969) (same); *White* v. *Weiser*, 412 U.S. 783, 791 (1973) (same).[10] The sanctity of county boundaries is

[9] The Illustrative Plan does not attempt to add African-American population to the Second District, as did the unconstitutional plan, by placing the City of Macon in the Second District. The Illustrative Plan places most of Macon in the Eleventh District, consistent with the district court's order to use the first enacted plan (1991) as a model. The Illustrative Plan does not place any of the remainder of Macon—or of Bibb County—in the Second District.

[10] *Connor* v. *Finch*, *supra*, dealt with court-ordered state legislative plans, not congressional redistricting. The district court incorrectly relied on *Connor*, see J.S. App. 8a, to justify rigid adherence to the asserted state policy against splitting counties outside the Atlanta area.

particularly questionable in Georgia. The three-judge court took judicial notice at an earlier stage of this case that "until 1962 the county unit system was used to undermine the voting strength of counties with large black populations." J.S. App. 40a. The county unit system was also employed to avoid one-person, one-vote requirements. See also *Wesberry* v. *Sanders*, *supra*. The State of Georgia has split counties outside the Atlanta area for purposes of congressional redistricting in the past; in the 1970s, Whitfield County was divided in a highly irregular pattern between two congressional districts. See 94-631 J.A. 79. The State does not "consistently appl[y]," *Karcher*, 462 U.S. at 740, a policy of keeping counties intact throughout the State; as the three-judge court itself found, Georgia's "preference" against splitting counties has not applied at all to the Atlanta area since the county unit system was struck down. J.S. App. 8a-10a. Both the 1972 and 1982 districting plans split counties in the Atlanta area, and the three-judge court's own plan splits six counties in the immediate area of Atlanta. *Id.* at 15a.[11]

3. The Illustrative Plan demonstrates that a remedy is feasible that has a lower overall population deviation than the court's plan and that otherwise comports with the law. Appellees have advanced two bases for rejecting the Illustrative Plan. Neither of them is persuasive.

a. The Johnson Appellees have argued that the Illustrative Plan "has no probative value as a one

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[11] Although the court stated that it split those counties "for population density reasons," J.S. App. 15a, it later retreated to the claim that "it would be impossible to avoid splitting *any* counties," *id.* at 18a n.12 (emphasis added).

person, one vote benchmark * * * because the DOJ did not respect Georgia's voting precincts in drawing its plan." Johnson Mot. to Aff. 24. That contention is incorrect. The Illustrative Plan was built on census tracts, not precincts, because at the time it was drawn, the United States did not have data on Georgia's precincts in its mapping program. But the use of census tracts does not affect the utility of the Illustrative Plan in demonstrating that a plan with a lower overall population deviation and that otherwise comports with the law was feasible.

Since the Illustrative Plan as a whole splits only two counties outside the Atlanta area and since precinct lines follow county lines, it is doubtful that the Plan splits an inordinate number of precincts. In addition, the size of a census tract is typically of the same order of magnitude as a precinct in Georgia, and a census tract is typically drawn based on considerations similar to those used in drawing precinct lines.[12]

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[12] "Census tracts usually have between 2,500 and 8,000 persons and, when first delineated, are designed to be homogeneous with respect to population characteristics, economic status, and living conditions." U.S. Department of Commerce, Bureau of the Census, *1990 Census of Population: Social and Economic Characteristics, Georgia* A-5 (1993). A precinct in Georgia is generally to include less than 2,000 electors (which means more than 2,000 people), Ga. Code Ann. § 21-2-263 (Michie Supp. 1995). Voting precincts are also to follow the same kinds of landmarks that can be expected to form the boundaries of census tracts, such as "[v]isible features which are readily distinguishable upon the ground (such as streets, railroad tracks, streams, lakes, and ridges) and which are indicated upon official * * * maps, *current census maps*, city or county planning maps, * * * or any combination of such maps." Ga. Code Ann. § 21-2-261.1(a)(1) (Michie Supp. 1995) (emphasis added).

Therefore, insofar as the Illustrative Plan may split more precincts than does the court's plan in those areas where counties are divided,[13] the Plan could certainly be refined to eliminate those precinct splits. Finally, although precinct lines have some importance in the redistricting process, they are not sacrosanct. They are largely an administrative measure for dividing voters among different polling places and they are subject to change under Georgia law "to suit the convenience of the electors and to promote the public interests." Ga. Code Ann. § 21-3-161(a) (Michie 1993). The fact that the Illustrative Plan was designed using census tracts rather than voting precincts therefore does not undermine that plan's probative value.

b. Contrary to the State's suggestion, the excessive deviations in the court's plan (as compared to the Illustrative Plan) are not justified because "there have been substantial population changes over the past six years throughout Georgia" and "[e]ven exact mathematical precision in a reapportionment plan based on the 1990 census necessarily must have significant current deviations *today*." Georgia Mot. to Aff. 18. This Court rejected precisely that argument in *Karcher*, 462 U.S. at 732. Justice White's dissenting opinion in that case argued that the fact that "[d]istrict populations are constantly changing" could justify a legislature in adopting a plan with a larger-than-necessary overall population deviation. *Id.* at 771. The Court rejected that argument on the ground that "problems with the data at hand apply equally to any population-based standard" and that "[a]s between

[13] The district court noted that its own plan split precincts in some areas. J.S. App. 9a n.6.

two standards—equality or something less than equality—only the former reflects the aspirations of Art. I, § 2." *Id.* at 732. That principle applies even more clearly to this case, since court-ordered districting is held to a stricter standard than the legislative districting at issue in *Karcher*. See *Connor*, 431 U.S. at 413-414; *Chapman*, 420 U.S. at 26-27.

B. THE DISTRICT COURT'S PLAN VIOLATES SECTION 2 OF THE VOTING RIGHTS ACT

The district court's plan violates Section 2 of the Voting Rights Act because the "totality of circumstances" shows that the creation of a majority-minority district in east-central Georgia is necessary to produce a congressional redistricting plan that does not dilute black voting strength. The district court's plan fails to create such a district.

The basic elements of a Section 2 case, as set forth in *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986), are present here. The Illustrative Plan demonstrates that the African-American population in Georgia is sufficiently large and compact—employing the State's own traditional districting criteria—to form a majority-minority district located in the east-central area of the State. African-Americans form a politically cohesive group in that area, and there is a pattern of racially polarized bloc voting such that whites voting as a bloc usually can defeat the candidate preferred by the African-American voters. Moreover, the totality of the circumstances—including a history of discrimination against African-Americans and the fact that the court's plan has only one majority-black district out of eleven (9%) while African-Americans constitute 27% of Georgia's population—demonstrates that African-Americans

will not have an equal opportunity to participate in the electoral process and to elect candidates of their choice under the district court's plan. We do not contend that a majority-minority district must be drawn wherever it is possible to do so. The district court's failure to draw such a district in this case, however, violated the substantive standards of Section 2.

1. *Compactness/Numerosity.* According to the district court, a second majority-minority district cannot be drawn in Georgia "due primarily to the geographic dispersion of its minority population." J.S. App. 20a. That is clearly incorrect.[14]

The African-American population in east-central Georgia is sufficiently large to create a second district. The Eleventh District in the Illustrative Plan is located in that area. Its population is 54.60% African-American, and its VAP is 51.04% African-American. The district has a population deviation of only 0.10%. See J.S. App. 45a.

The Eleventh District in the Illustrative Plan is also compact, contiguous, and its boundaries are regular. See J.S. App. 44a (map). It clearly comports with the State's traditional districting practices, as identified by the district court. Compare *Jeffers* v. *Clinton*, 730 F. Supp. 196, 207 (E.D. Ark. 1989), aff'd mem., 498 U.S. 1019 (1991); *Houston* v. *Lafayette County*, 56 F.3d 606 (5th Cir. 1995).

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[14] The district court made the same finding in its earlier decision in this case. See 864 F. Supp. at 1390. That finding was not affirmed on appeal because this Court had no occasion to consider whether Section 2 required the creation of two majority African-American districts in Georgia.

The district court stated that maintaining counties intact outside the Atlanta area was a traditional practice in Georgia. See J.S. App. 4a-15a; but see pp. 17-18, *supra*. The Illustrative Plan shows that a majority-minority district that respects that principle can be drawn in east-central Georgia. The Eleventh District in the Illustrative Plan divides only one county outside the Atlanta area, and the Illustrative Plan as a whole divides only one additional county outside the Atlanta area. See pp. 15-17, *supra*.

While the district court focused on the splitting of counties outside the Atlanta area, the appellees have suggested that the Illustrative Plan can be faulted for splitting DeKalb County, which is in the Atlanta area. Johnson Mot. to Aff. 18. But as indicated above, Georgia's "preference" against splitting counties has not applied to that area since the county unit system was struck down. J.S. App. 8a-10a. The district court's own plan divides DeKalb County, although in a different way from the Illustrative Plan. See *id.* at 15a-16a. The divisions that the Illustrative Plan makes in DeKalb County are at least as regular as the divisions made in the other Atlanta-area counties in the court's plan, compare *id.* at 44a (Illustrative Plan) with *id.* at 41a (court's plan), and (unlike the divisions in the court's plan) they closely resemble the divisions in DeKalb County that the State itself made in its first post-1990 plan, compare *id.* at 44a (Illustrative Plan) with *id.* at 46a (State's first post-1990 plan). As the district court stated, "the Georgia legislature has already made the political decision to split DeKalb for population density reasons, first in 1982, and again in each of the three plans presented to the DOJ for preclearance in 1992." *Id.* at 16a. The

division of DeKalb County thus does not cast any doubt on the compactness of the Eleventh District in the Illustrative Plan or on that district's consistency with traditional state districting principles.[15]

The district court also identified maintaining the cores of existing districts and keeping the State's four "corner districts" intact as traditional state practices. J.S. App. 16a-17a, 17a-18a. The Illustrative Plan recognizes the cores of the existing districts and maintains the same three corner districts as does the court's plan. See *id.* at 44a (map).[16]

The Eleventh District in the Illustrative Plan thus follows Georgia's traditional districting criteria far better than does the district court's plan. Moreover,

[15] The district court correctly noted that, although its own plan splits precincts in some places, J.S. App. 9a n.6, Georgia generally seeks to avoid splitting precincts, *id.* at 9a. As we have described, the Illustrative Plan was built on census tracts, not precincts, because at the time it was drawn the United States did not have data on Georgia's precincts in its mapping program. Nonetheless, for the reasons given above, see pp. 19-20, *supra*, it is doubtful that the Illustrative Plan as drawn splits an inordinate number of precincts, and it could certainly be redrawn based on precincts instead of census tracts.

[16] The district court observed that its plan "maintains ninety-five counties (totally or partially) in the same districts as they were located in the 1982 plan—significant given the addition of the Eleventh District." J.S. App. 10a. However, the Illustrative Plan fares better under the same measure; it maintains 101 counties totally or partially within the same district as in the 1982 plan. Similarly, when compared to the plan the Georgia General Assembly first passed in 1991—prior to any objection from the United States Attorney General—the Illustrative Plan maintains 138 of Georgia's 159 counties totally or partially in the same district while the district court's plan keeps only 123 counties in the same district. Compare 94-929 J.A. 80 with J.S. App. 44a (map).

it does not suffer from the deficiencies of the district that this Court found unconstitutional in *Miller* v. *Johnson*, 115 S. Ct. 2475 (1995). The Illustrative Plan's Eleventh District does not incorporate the Athens-Augusta strip that the district court found was "historically" located in the Tenth District and which was partially located in the district that this Court found unconstitutional in *Miller*. See J.S. App. 14a. Nor does the Eleventh District in the Illustrative Plan contain any part of the southeastern coastal area, as did the district that this Court found unconstitutional in *Miller*. See *id.* at 19a. As the Illustrative Plan therefore shows, the African-American population in DeKalb County and central Georgia is "sufficiently large and geographically compact to constitute a majority" in a second congressional district, *Gingles*, 478 U.S. at 48, without subordinating "Georgia's traditional districting policies," "constitutional norms," or "common sense," J.S. App. 21a.

2. *Racially Polarized Voting.* The evidence in the record in this case established the existence of legally significant racially polarized voting. The district court at one point referred to what it termed the "lack of any significant vote polarization." J.S. App. 20a. The court also stated that "some degree of [racial] vote polarization [in Georgia] exists" but "not in alarming quantities," and that "[t]he second and third *Gingles* preconditions therefore would not be met in a Section 2 challenge to the [court's] remedy." *Id.* at 23a (quoting 864 F. Supp. at 1390). To the extent those statements are read as factual findings that racially polarized voting in Georgia and, in particular, in the east-central portion of the State,

does not satisfy the second and third *Gingles* preconditions, they are clearly erroneous.

The district court appeared to base its statements regarding racially polarized voting on the findings it made at the earlier stage of this case. At that time, the court found that 22% to 38% of white people in the area of the 1992 Eleventh District (which substantially overlaps the area of the Eleventh District in the Illustrative Plan) would vote for African-American candidates, while 20% to 23% of African-Americans in the area would vote for white candidates. 864 F. Supp. at 1390.

Those findings, which substantially overstate the degree of white crossover voting,[17] are nevertheless sufficient to demonstrate the existence of legally significant racially polarized voting, especially in the area in which the Illustrative Plan's Eleventh

[17] Experts for the United States and plaintiffs found that white crossover voting ranged from 0% to 26%, and that black crossover voting ranged from 3% to 11% in the most relevant elections. J.A. 54-61, 69-70, 72. The court's higher crossover figures included consideration of judicial elections involving appointed black incumbents and elections in which there were multiple black candidates and a white candidate. Both kinds of elections are substantially less probative of racially polarized voting than elections between one black and one white candidate. See J.A. 60-61. See also *Gingles*, 478 U.S. at 57; *Collins* v. *City of Norfolk*, 883 F.2d 1232, 1243 (4th Cir. 1989), cert. denied, 498 U.S. 938 (1990). Indeed, the plaintiffs' expert, Dr. Weber, testified that judicial elections do not provide a good indication of voting patterns in congressional elections (J.A. 88) and that, if the judicial incumbent elections were removed from his own calculation, the white crossover vote would drop to 26.6% (J.A. 93). If the elections involving multiple black candidates were removed, he testified that the white crossover calculation would drop to 17%. J.A. 94.

District is located. The court's plan contains three districts—the Fourth, the Tenth, and the Eleventh—that each contain parts of the area covered by the Eleventh District in the Illustrative Plan. Of those three districts, the Tenth District has the largest African-American VAP—approximately 34%. Calculating white crossover voting at 30% and black crossover voting at 22%—the midpoints of the ranges found by the district court—a black-preferred candidate would likely be foreclosed from winning election in the court's Tenth District.[18] The same result would follow even more clearly in the court's Fourth and Eleventh districts, which have African-American VAPs of 33% and 11%, respectively. Voting polarization will thus prevent African-American voters in this area of the State from electing candidates of choice under the district court's plan.

[18] Black political cohesion is the inverse of black crossover voting. Under the assumption stated in the text of 22% black crossover voting, black political cohesion is 78% (100% - 22%). The vote for the minority-preferred candidate can be derived by multiplying the black VAP (34%) by black political cohesion (78%), and then adding the white VAP (66%) multiplied by the percentage of white crossover voting (30%). If crossover voting were at the midpoints of the ranges found by the district court, and if turnout rates for black and white voters were identical, the black-preferred candidate would receive 46% of the vote (and the white-preferred candidate therefore would receive 54%) in the court's Tenth District. If black crossover voting remained at approximately 22%, the white crossover vote would have to be approximately 36%—or at the very top of the range found by the district court—in order for a black-preferred candidate to win. If the consistently lower black turnout rates found by the district court are factored in, see 864 F. Supp. at 1392, the white crossover vote would have to be still higher for a minority preferred candidate to win.

The record below shows, moreover, that racial polarization in Georgia generally, and in the counties that were encompassed by the 1992 Eleventh District, is substantially more serious than the district court acknowledged. At trial, the parties stipulated to the facts that, with one exception, all of the African-American state legislators in Georgia were elected in districts that were at least majority African-American and that all but one of the 181 majority-white state legislative districts were represented by white legislators. See J.A. 116. The parties also stipulated that in Putnam, Greene, and Twiggs Counties—all of which are entirely located within the Eleventh District in the Illustrative Plan—civil rights litigation had resulted either in judicial findings of racially polarized voting or in changes in the challenged electoral system, or both. J.A. 123-125. Those facts support the conclusion that racially polarized voting results in the usual defeat of the minority-preferred candidate in majority-white election districts.

The expert testimony reached the same conclusion. Studying voting patterns in the precincts contained in the 1992 Eleventh District, the United States' expert, Dr. Lichtman, found that white crossover voting ranged from 0% to 26%. See note 17, *supra*. The plaintiffs' expert, Dr. Weber, essentially corroborated the results found by Dr. Lichtman with respect to the levels of polarization in the area of the Eleventh District. J.A. 99-115. In each instance, however, he found the results to be lacking in significance because, despite the polarization, the African-American candidates won within the borders of the 60% VAP African-American 1992 Eleventh District. J.A. 100-106. Far from casting doubt on the degree of

racially polarized voting, his testimony supported the showing that must be made to establish a Section 2 claim: that candidates of choice of African-Americans in the area of the 1992 Eleventh District can win majorities only if African-Americans form a majority of the constituency.

The district court's apparent findings of a lack of significant racial polarization also directly conflict with its Section 2 findings regarding the Atlanta area. The court found that "Section 2 * * * does require maintenance of the Fifth [Atlanta] District as a majority-minority district." J.S. App. 24a-25a. Indeed, the court found that polarization there was sufficiently serious that "maintaining the percentage of black registered voters as close to fifty-five percent as possible was necessary, in our view, to avoid dilution of the Fifth District minorities' rights." *Id.* at 25a-26a.

Those findings were based exclusively on the analysis prepared by Dr. Katz, the State's expert, at the original trial. J.S. App. 25a; see also 864 F. Supp. at 1390, 1391-1392. Dr. Katz analyzed a large group of Georgia election results and determined the racial composition of the registered electorate in each case. From those data, he calculated the probability of a black candidate winning an election in Georgia as a function of the percentage of blacks in the relevant electorate. J.A. 11-29, 33-37. He concluded that the probability of a black candidate winning an election in Georgia does not go above 50% until the percentage of registered voters who are black reaches approximately 50%. J.A. 28-29, 37.

Dr. Katz's study corroborates the conclusion that African-Americans can win elections in Georgia only when they are in the majority in the constituency.

Moreover, as the district court acknowledged, J.S. App. 26a n.18, the study is based on statewide data.[19] The study contained no evidence that polarization might differ in the areas of the Fifth and Eleventh Districts. Thus, if—as the district court believed—the study demonstrates that there is legally significant racially polarized voting in the area of the Fifth District, it would also demonstrate that there is similar racially polarized voting in the east-central area of the State, where the Illustrative Plan's Eleventh District is located. The court's contrary conclusions with regard to the two areas are inexplicably inconsistent.

3. *Totality Of Circumstances.* All the other factors that contribute to a "totality of circumstances" analysis establish that the district court's failure to draw a second majority-minority district in east-central Georgia violates Section 2. The district court's finding that Section 2 requires creation of a majority-minority district in the Atlanta area confirms that conclusion.

The history of racial discrimination in voting in Georgia has been spelled out in prior decisions, and the district court took judicial notice of that history

[19] It is doubtful that exclusive reliance on such statewide figures would be appropriate in an area-specific Section 2 challenge, see *Gingles*, 478 U.S. at 59 n.28, and, in any event, Dr. Katz's study does not directly address the question whether legally significant racially polarized voting exists, since it does not make "discrete inquiries into minority and white voting practices," *id.* at 56. But that does not deprive Dr. Katz's figures of their value in corroborating the consistent pattern of racially polarized voting in specific areas of the State shown by the evidence presented by Drs. Lichtman and Weber.

in its initial opinion in this litigation. See J.S. App. 39a-40a. From the time of Georgia's first constitution, which barred blacks from voting as a matter of law, Georgia has employed a variety of devices to dilute black voting strength. For that purpose, the State has employed literacy tests, white primaries, and the county unit system. The State has also used districting as a way of discriminating against African-American citizens. *Ibid.* From Reconstruction until the 1980s, black voters were not in the majority in any of the State's congressional districts. In 1982, the District Court for the District of Columbia found that the State of Georgia had acted with a discriminatory purpose in adopting a congressional redistricting plan that failed to include a district in the Atlanta area whose registered voters were majority African-American. See *Busbee* v. *Smith*, 549 F. Supp. 494 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983).

At the original trial, the parties stipulated to Georgia's history of past discrimination. See J.A. 117-123, 125-133. Among the consequences of that history are continuing and significant socioeconomic disparities between African-Americans and white persons in Georgia. See J.A. 133-135. Those differences result in African-Americans having a smaller economic base on which to draw to mount political campaigns. In addition, the evidence showed that African-Americans have lower registration and turnout rates than whites. See J.A. 77-78. The political handicaps suffered by blacks are aggravated by the large geographical area covered by Georgia's congressional districts and by Georgia's requirement that those who do not win a majority vote in a primary face runoff elections. See *Gingles*, 478 U.S. at 45.

Finally, the district court's plan, with only one majority-minority district, would leave black voters substantially underrepresented, while creating two majority-minority districts out of eleven (18%) would not overrepresent African-Americans, who constitute 27% of the State's population. See *Johnson* v. *DeGrandy*, 114 S. Ct. 2647, 2662-2663 (1994).

C. THE DISTRICT COURT VIOLATED THE PRINCIPLE OF *UPHAM* V. *SEAMON* IN DEPARTING UNDULY FROM STATE POLICIES

The discussion in Part B(2) above, showing that the Illustrative Plan implements Georgia's traditional districting criteria, essentially demonstrates as well that the district court's remedial plan departed unduly from the State's own districting policies, in contravention of *Upham* v. *Seamon*, 456 U.S. 37 (1982). In *Upham*, the Court observed that "[w]henever a district court is faced with entering [a] reapportionment order, * * * it is faced with the problem of reconciling the requirements of the Constitution with the goals of state political policy." *Id.* at 43 (internal quotation marks omitted). That reconciliation "can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect." *Ibid.* As the district court stated in this case, "[i]n fashioning a remedy in redistricting cases, courts are generally limited to correcting only those unconstitutional aspects of a state's plan." J.S. App. 2a. To this extent, the redistricting context is governed by the same rule that governs all constitutional litigation: the remedial powers of the district court extend only to correcting that

condition that is found to offend the Constitution. *Milliken* v. *Bradley*, 418 U.S. 717, 738 (1974).

The district court recognized that state legislative policy favored the creation of two majority-minority districts, insofar as that could be accomplished within constitutional and statutory limits and without departing unduly from other traditional districting principles. The court stated that "[i]f Georgia had a concentrated minority population large enough to create a second majority-minority district without subverting traditional districting principles, the Court would have included one since Georgia's legislature probably would have done so."[20] J.S. App. 21a n.16. Thus, the district court accepted in principle that, if a second majority-minority district could be drawn, doing so would be most consistent with state districting policy. The court erred, however, in concluding that such a district was not possible.

The Illustrative Plan shows that the district court should have adopted a plan with two majority-

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[20] The court correctly stated the state legislative policy in this area. See J.A. 153, 188. The first plan that the State adopted in 1991, prior to either of the Section 5 objections that were lodged by the Department of Justice, provides a useful guide to the State's districting principles. The 1991 plan included two majority-minority districts, one of which (the Eleventh) was located in the same general area of the State and based on the same DeKalb County to Bibb County axis as the Eleventh District in the Illustrative Plan. Compare J.S. App. 46a (1991 plan) with *id.* at 44a (Illustrative Plan). The State eventually drew the district in a way that led to its being found unconstitutional. See *id.* at 13a n.9. That does not negate the fact that, since the 1990 census, it has been part of the State's redistricting policy to draw two majority-minority congressional districts in Georgia, including one in the area of the Eleventh District.

minority districts. It demonstrates that a plan could have been drawn that comports with Georgia's traditional geographic districting practices and that creates two clearly compact majority-minority districts.[21] The Eleventh District in the Illustrative Plan closely resembles the Eleventh District as configured in the first plan the State passed in 1991. The Illustrative Plan also better comports with the State's "historic[]" policy of protecting incumbents, J.S. App. 18a; see also *id.* at 14a, than does the court's plan, which puts incumbents together in two districts and moves an additional incumbent out of his district. Unlike the court's plan, the Illustrative Plan leaves the residences of all incumbents in the districts they currently represent. See United States' Response to Plaintiffs' Plans Remedy 4X and 4X-R, R. 369, at 10 (filed Nov. 21, 1995).[22] Nor does the Illustrative Plan

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[21] The district court's rejection of the State's decision to draw a majority-black, urban/suburban Eleventh Congressional District stretching southeast from metropolitan Atlanta, in favor of a majority-white, urban/suburban district stretching northeast from metropolitan Atlanta, is especially troubling, because it treats the State's efforts to create a majority-black district "*less* favorably than similar efforts on behalf of other groups." See *Miller*, 115 S. Ct. at 2497 (O'Connor, J., concurring).

[22] The State's policy avoids putting incumbents to the choice of either running against other incumbents, retiring, or seeking reelection from a substantially different constituency from the one that elected them. The 1996 primary elections have been held under the court's plan. Four incumbents—including the representatives of the two majority-minority districts that were declared unconstitutional—ran either in different districts from those they had previously represented or in districts that no longer included their residences. Each of them won their party's nomination, and all face opposition from a candidate of the opposing party in the general election.

suffer from the defects that this Court found in *Miller* v. *Johnson*; it does not take race into account as the "predominant, overriding factor," *Miller*, 115 S. Ct. at 2490, that "subordinated traditional race-neutral districting principles," *id.* at 2488, or substantially disregard "customary and traditional districting practices," *id.* at 2497 (O'Connor, J., concurring). See *Bush* v. *Vera*, No. 94-805 (June 13, 1996), slip op. 5 (O'Connor, J., concurring) ("States may intentionally create majority-minority districts, and may otherwise take race into consideration without coming under strict scrutiny.") There was therefore no basis for the district court to disregard the state legislature's choices.

The district court's error is substantially similar to the error committed by the district court in *White* v. *Weiser*, *supra*. In that case, two remedial plans were presented to the district court. The court selected the one that had a higher population deviation and departed more from the malapportioned plan that the State had adopted, but that split fewer counties. See 412 U.S. at 795-796, 797 n.16. This Court reversed that decision, finding that the court should have adopted the plan with a lower population deviation that "most clearly approximated the reapportionment plan of the state legislature, while satisfying constitutional requirements." *Id.* at 796. In *Upham*, 456 U.S. at 41-42, the Court relied on that result in summarily reversing a district court's adoption of a remedial plan that disregarded state policy more than necessary to cure the violation. Reversal is also warranted here.

D. THE DISTRICT COURT'S PLAN VIOLATES SECTION 5'S NONRETROGRESSION STANDARD

Although we did not present any question in our Jurisdictional Statement concerning the application of the nonretrogression standard of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, to the district court's plan, the Abrams appellees did so. See 95-1425 J.S. at i (Question 2). This Court noted probable jurisdiction with regard to both appeals. We therefore address below the appropriate analysis of Section 5's nonretrogression standard, as it would apply to this case. As we explain below, application of the nonretrogression standard in this case turns on the same factors as the Section 2 and *Upham* v. *Seamon* arguments that we have presented above.

1. Under Section 5 of the Voting Rights Act, redistricting plans adopted by covered jurisdictions must be submitted to the Department of Justice or the District Court for the District of Columbia for preclearance before they can be implemented. That requirement generally extends even to court-ordered remedial plans. See *McDaniel* v. *Sanchez*, 452 U.S. 130, 149-150 (1981) ("The federal interest in preventing local jurisdictions from making changes that adversely affect the rights of minority voters is the same whether a change is required to remedy a constitutional violation or is merely the product of a community's perception of the desirability of responding to new social patterns."). There is a limited "court decree" exception to the preclearance requirement, however, for plans that a court itself fashions (rather than relying on a plan presented by a litigant). *Id.* at 148-149 (quoting the 1975 Senate Committee Report on extension of the Voting Rights Act); *Connor* v. *Johnson*, 402 U.S. 690, 691 (1971) (per

curiam). The district court announced that the plan that it adopted in this case, although "it resembles some of the legislative plans" the State adopted in 1982 and in the post-1990 redistricting, J.S. App. 27a, was the court's "own unique product," *id.* at 28a, and thus fell within the exception for court-fashioned plans.

2. The fact that the district court's plan did not require submission for Section 5 preclearance does not mean that the substantive standards of Section 5 have no bearing on the adequacy of the district court's remedial determination. Even when a court is formulating its own remedial plan, it should ascertain that the resulting plan satisfies the legal standards applicable to redistricting plans, and Section 5 provides one source of such standards. Cf. *Connor*, 431 U.S. at 415 (court-ordered plan must be "free from any taint of arbitrariness or discrimination"). In particular, Section 5's nonretrogression standard was designed "to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U.S. 130, 141 (1976). That danger exists when a court replaces an existing plan with a new one. Although the preclearance mechanism is not applicable to court-fashioned plans, a court "should follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases." *McDaniel*, 452 U.S. at 149 (quoting S. Rep. No. 295, 94th Cong.,

1st Sess. 19 (1975)). Accord *Edge* v. *Sumter County School Dist.*, 775 F.2d 1509, 1510 (11th Cir. 1985).[23]

The only Section 5 standard at issue in this case is the basic nonretrogression requirement. In order to apply that requirement, a benchmark must be established and the voting change at issue—the district court's remedial plan—must be measured against that benchmark to determine whether the opportunities of minority voters will be "augmented, diminished, or not affected by the change affecting voting." *Beer*, 425 U.S. at 141 (emphasis omitted). The initial step in applying the nonretrogression requirement is to determine the appropriate benchmark.

3. In their Jurisdictional Statement, the Abrams appellants argued that the district court's plan is retrogressive under Section 5, regardless of whether the benchmark is "the state's initial [1991] eleven seat plan containing two majority black districts, or the state's clearly articulated policy and goal of creating two majority black districts." 95-1425 J.S. 20. The Abrams appellants also suggested that the plan the State adopted and put into effect in 1992 containing three majority African-American districts (the 1992 Plan), when cured of its unconstitutional defects, could provide a benchmark as well. *Id.* at 20 n.10. The Johnson appellees, on the other hand, have argued that the State's *1982* plan provides the appropriate benchmark for Section 5 analysis. Johnson Mot. to Aff. 25; see also Georgia Mot. to Aff. 14-16.

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[23] The district court appeared to believe that its plan did not have to be measured against nonretrogression requirements, see J.S. App. 27a n.20, but it nonetheless "note[d]" its view that its remedy "is not retrogressive" and "does not violate Section 5," *id.* at 26a, 27a.

The district court agreed with the Johnson appellees. J.S. App. 27a n.20. In our view, the appropriate benchmark by which to measure retrogression in the circumstances of this case is the 1992 Plan.

Under 28 C.F.R. 51.54(b)(1), "the Attorney General will normally compare the submitted change to the voting practice or procedure in effect at the time of the submission." That plan will not be used as the benchmark, however, if it

> was not in effect on the jurisdiction's applicable date for coverage [which, for Georgia, was November 1, 1964, see 28 C.F.R. Pt. 51, App.] and is not otherwise legally enforceable under section 5.

Ibid. Therefore, where the plan in effect at the date of the submission either was in effect on the coverage date or was itself precleared, it provides the appropriate Section 5 benchmark.

The 1992 Plan satisfies those criteria. It was the plan that was in effect when the district court decided this case, since it had been used by the State in the 1992 and 1994 congressional elections. That plan had received Department of Justice preclearance and was "legally enforceable under section 5." Referring to other provisions in the same regulations, this Court has recognized that "the construction placed upon the [Voting Rights] Act by the Attorney General * * * is entitled to considerable deference." *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 178-179 (1985); *United States* v. *Board of Comm'rs of Sheffield*, 435 U.S. 110, 131-132 n.21 (1978); see also *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 508-509 (1992); *Perkins* v. *Matthews*, 400 U.S. 379, 390-391 (1971).

The fact that the 1992 Plan is the benchmark does not mean that all plans that reduce voting opportunities for minority groups as compared with that benchmark would violate the retrogression standard. Specifically, a reduction in minority voting opportunities that is required in order to bring a State's electoral practices into compliance with the Constitution cannot be said to be "retrogressive" in the sense used by this Court in *Beer* and *City of Lockhart* v. *United States*, 460 U.S. 125, 133-134 (1983). Accordingly, insofar as a reduction in minority voting opportunities is necessary to satisfy the Constitution, that reduction does not violate the principles of Section 5. See 52 Fed. Reg. 486, 488 (1987). For that reason, while the appropriate benchmark in this case is the 1992 Plan, legally significant retrogression would occur only insofar as a new plan reduces minority voting opportunity more than necessary to correct the constitutional defects of the 1992 Plan.[24]

The modification necessary in the 1992 Plan in order to employ it to measure Section 5 retrogression should not be any greater than necessary to correct its constitutional defects. Assume, for example, that a State subject to Section 5 enacts a districting plan with three majority-minority districts, one of which is an unconstitutional racial gerrymander. It would be inconsistent with Section 5 to permit the State to cure the defect in the plan by substituting a new plan with *no* majority-minority districts; the fact that one of three districts is constitutionally defective does not license the complete retrogression that would occur with the elimination of all majority-minority

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[24] We therefore do not contend that the very aspect of a plan that is unconstitutional could serve as a benchmark.

districts. Similarly, where a State has drawn a single majority-minority district as an unconstitutional racial gerrymander in an area of the State in which a constitutionally acceptable majority-minority district could have been drawn, see *Bush* v. *Vera*, No. 94-805 (June 13, 1996), slip op. 6-7 (O'Connor, J., concurring), the State would fail to comply with Section 5 if it were simply to eliminate the unconstitutional majority-minority district to cure the constitutional defect, without substituting a constitutionally valid majority-minority district. The legislative policy underlying the retrogression analysis is that a covered jurisdiction, having once acted to permit minorities to achieve a certain level of political participation, may not act to reduce that level. See *Beer*, 425 U.S. at 140 (purpose of Section 5 effects test is "to prevent States from undoing or defeating the rights recently won by Negroes") (brackets and internal quotation marks omitted) (quoting H.R. Rep. No. 397, 91st Cong., 1st Sess. 8 (1969)).

4. The district court erred in justifying its comparison with the 1982 Plan, rather than the 1992 Plan, on the ground that "28 C.F.R. § 51.54(b)(1) * * * dictates using the last constitutional plan on the ground if the current plan is unconstitutional." J.S. App. 27a n.20. The cited regulation precludes use as a benchmark of a plan that is "not * * * legally enforceable *under section 5*" (emphasis added)—*i.e.*, a plan that was not in use on the coverage date and has not been judicially or administratively precleared. The provision does not require analysis of whether the benchmark is legally valid in other respects.

The use of unconstitutional plans as the bases for Section 5 retrogression analyses was intended by Congress. Compare Johnson Mot. to Aff. 25. The

Congress that enacted Section 5 was surely aware that many of the practices in effect in covered jurisdictions on the coverage date were unconstitutional. Cf. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328 (1966); see also *Beer*, 425 U.S. at 140. That fact has never been thought to bar use of those practices as Section 5 benchmarks for covered jurisdictions. Population changes that result in a districting plan becoming malapportioned (and therefore unconstitutional)—as occurred with the 1982 plan in this case—also do not bar the use of the malapportioned plan as a Section 5 benchmark. This Court also has held that the practices actually in effect in a jurisdiction provide the appropriate benchmark for Section 5 analysis, even though those practices were legally invalid as a matter of state law. See *City of Lockhart*, 460 U.S. at 133 ("Section 5 was intended to halt actual retrogression in minority voting strength without regard for the legality under state law of the practices already in effect."); *Perkins*, 400 U.S. at 394.

5. The most appropriate benchmark to measure retrogression in this case is thus the 1992 Plan, modified as necessary to cure its unconstitutional defects. The constitutional defects in the 1992 Plan could not have been corrected without eliminating one of its three majority-minority districts. The relevant question thus is whether it was necessary to remove *two* of those majority-minority districts, as did the plan adopted by the district court, in order to make the 1992 Plan constitutional.

In the district court's view, eliminating two majority-minority districts was necessary, and any modification of the 1992 Plan to make it constitutional would therefore leave the State with only one majority-minority district. The court stated that it

"considered the possibility of creating a second majority-minority district and concluded that to do so would require us to subordinate Georgia's traditional districting policies and consider race predominantly, to the exclusion of both constitutional norms and common sense." J.S. App. 21a. See also *id.* at 20a n.15. If that were correct, then the district court's plan, containing one majority-minority district, would not violate the nonretrogression standard.

We have shown above that the district court was mistaken in finding that it was impossible to draw a legally valid second majority-minority congressional district in Georgia. The Illustrative Plan shows that a second such compact district in the east-central portion of Georgia could be drawn in full compliance with the State's legitimate districting policies. The district court's one-district plan is therefore retrogressive, since it provides less opportunity for minority voters than would the 1992 Plan, after that plan was modified to eliminate its constitutional defects. The nonretrogression principle thus provides an additional basis for reversal of the district court decision in this case.[35]

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[35] The retrogression issue in this case is very closely related to the analysis under Section 2 and *Upham* v. *Seamon*. The district court itself recognized that its reasons for finding its plan nonretrogressive were the same as its reasons for finding that that plan complied with Section 2 and state policies generally. See J.S. App. 27a (stating the district court's plan "does not violate Section 5 for the same primary reasons that it does not violate Section 2"). It also stated that, "[i]f Georgia had a concentrated minority population large enough to create a second majority-minority district without subverting traditional districting principles, the Court would have included one since Georgia's legislature probably would have done so." *Id.* at 21a n.16. Accordingly, if the district court was required by

CONCLUSION

This Court should reverse the district court's order entering the remedial plan and remand the case to the district court with instructions to develop and put in place a new plan that is consistent with constitutional one-person, one-vote requirements and that contains two compact majority-minority districts.

Respectfully submitted.

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JULY 1996

Section 2 or the principles of *Upham* v. *Seamon* to draw two majority-minority districts, the nonretrogression principles of Section 5 require the same result. Conversely, if the district court were correct in stating that it was impossible to use Georgia's redistricting principles to draw two majority-minority districts, then the district court's failure to do so would not have violated the nonretrogression principle of Section 5.

APPENDIX

1. Article I, Section 2, of the United States Constitution provides, in pertinent part:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States[.] * * *
>
> * * * * *
>
> Representatives * * * shall be apportioned among the several States which may be included within this Union, according to their respective Numbers[.] * * *

2. Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other

members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

3. Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, provides, in pertinent part:

> Whenever a State * * * with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, * * * such State * * * may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, * * * and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice,

> or procedure has been submitted by the chief legal officer or other appropriate official of such State * * * to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission[.] * * *

4. Section 51.54 of Title 28 of the Code of Federal Regulations provides:

> (a) *Retrogression.* A change affecting voting is considered to have a discriminatory effect under section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (i.e., will make members of such a group worse off than they had been before the change) with respect to their opportunity to exercise the electoral franchise effectively. See *Beer* v. *United States*, 425 U.S. 130, 140-42 (1976).
>
> (b) *Benchmark.* (1) In determining whether a submitted change is retrogressive the Attorney General will normally compare the submitted change to the voting practice or procedure in effect at the time of the submission. If the existing practice or procedure upon submission was not in effect on the jurisdiction's applicable date for coverage (specified in [28 C.F.R. Pt. 51, App.]) and is not otherwise legally enforceable under section 5, it cannot serve as a benchmark, and, except as provided in paragraph (b)(4) of this section, the comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction.

(2) The Attorney General will make the comparison based on the conditions existing at the time of the submission.

(3) The implementation and use of an unprecleared voting change subject to section 5 review under § 51.18(a) does not operate to make that unprecleared change a benchmark for any subsequent change submitted by the jurisdiction. See § 51.18(c).

(4) Where at the time of submission of a change for section 5 review there exists no other lawful practice or procedure for use as a benchmark (e.g., where a newly incorporated college district selects a method of election) the Attorney General's preclearance determination will necessarily center on whether the submitted change was designed or adopted for the purpose of discriminating against members of racial or language minority groups.